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TAN WEK PIAU & ANOR v. HIN WONG HUAT SPEED BOAT & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ATAN MUSTAFFA YUSSOF AHMAD J
[ADMIRALTY ACTION IN PERSONAM
B NO: WA-27NCC-90-12-2019]
3 SEPTEMBER 2024

Abstract – *(i) The doctrine of res ipsa loquitur can be applied to shift the burden of proof to the alleged tortfeasor(s) to rebut the presumption of negligence. This doctrine is applicable when the accident is one that does not ordinarily occur in the absence of negligence and the alleged tortfeasor(s) had exclusive control over the instrumentality that caused the harm; (ii) A partnership may be vicariously liable for the negligence of its partners acting within the scope of the partnership business. In such a case, no formal employer-employee relationship is necessary to establish vicarious liability.*

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E ***TORT:*** *Negligence – Damages – Claim for general and special damages – Maritime collision between two boats – Claimant passenger of one of boats – Claimant suffered life-threatening injuries – Severe head injury caused claimant to suffer from significant cognitive and speech impairments and physical limitations – Whether there was negligence – Whether claim proven – Damages to be awarded*

F ***TORT:*** *Negligence – Res ipsa loquitur – Maritime collision between two boats – Claim for general and special damages – Claimant passenger of one of boats – Claimant suffered life-threatening injuries – Severe head injury caused claimant to suffer from significant cognitive and speech impairments and physical limitations – Whether doctrine of res ipsa loquitur applied – Whether burden of proof ought to shift to alleged tortfeasors to rebut presumption of negligence*

G ***TORT:*** *Negligence – Liability – Breach of duty of care – Claim for general and special damages – Maritime collision between two boats – Claimant passenger of one of boats – Claimant suffered life-threatening injuries – Severe head injury caused claimant to suffer from significant cognitive and speech impairments and physical limitations – Whether there was negligence in maintaining and operating boat –*
H *Whether there was breach of duty of care – Whether alleged tortfeasors of both boats liable*

TORT: *Negligence – Vicarious liability – Claim for general and special damages – Maritime collision between two boats – Claimant passenger of one of boats – Claimant suffered life-threatening injuries – Severe head injury caused claimant to*
I *suffer from significant cognitive and speech impairments and physical limitations – Whether there was negligence in maintaining and operating boats – Whether partners of boat business partnership vicariously liable*

MARITIME LAW: *Shipping – Safe speed – Maritime collision between two boats – Whether there was negligence by boats involved – Whether there were breaches of relevant maritime laws – Merchant Shipping (Collision Regulations) Order 1984, r. 6 – International Regulations for Preventing Collisions at Sea 1972, rr. 2, 6, 16 & 34*

A maritime collision had occurred between two speed boats near Port Klang. On the fateful day, the first plaintiff ('Madam Tan') was a passenger on the boat ('first boat') operated by the seventh defendant, which was part of a fleet owned by the first defendant, a partnership trading under the the name 'Hin Wong Huat Speed Boat' with the second to seventh defendants being partners in this business. As the first boat was departing from the Port Klang jetty, it collided with another boat ('second boat'). The second boat was operated by the eighth defendant. Following this collision, Madam Tan sustained life-threatening injuries, particularly a severe head trauma. These injuries included a left temporal hemorrhage, subarachnoid hemorrhage, fractures of the temporal bone and cerebral edema. Despite extensive medical care, Madam Tan continued to suffer from significant cognitive and speech impairments, as well as physical limitations. Madam Tan's husband ('second plaintiff') was appointed as her litigation representative to represent Madam Tan in the legal proceedings due to her inability to manage her own affairs. It was the plaintiffs' case that: (i) the collision was caused by the negligence of the seventh and/or eighth defendants in operating their respective boats. Particulars of negligence were pleaded against both operators, including their failures to, *inter alia*, maintain safe distances, give proper warnings/signals, give way, comply with maritime regulations and take evasive action; (ii) the first to sixth defendants were vicariously liable for the negligence of the seventh defendant as the operator of the first boat. The ninth defendant was vicariously liable for the negligence of the eighth defendant as the owner of the second boat; and (iii) due to her injuries, Madam Tan lost her ability to work as an accountant at two companies where she was previously employed. The plaintiffs relied on the doctrine of *res ipsa loquitur* against the defendants and claimed for, *inter alia*, general and special damages against the defendants. The issues that arose were: (i) whether the doctrine of *res ipsa loquitur* applied in this case to shift the burden of proof to the seventh and eight defendants to rebut the presumption of negligence; (ii) whether the seventh defendant was negligent in his operation and control of the first boat; (iii) whether the eighth defendant was negligent in his operation and control of the second boat; (iv) whether the first to sixth defendants were vicariously liable if the seventh defendant was found to be negligent; and (v) whether the ninth defendant was vicariously liable if the eighth defendant was found to be negligent.

Held (allowing claim against first to seventh defendants; awarding plaintiffs total damages of RM1,418,222.81):

(1) It was undisputed that Madam Tan was a passenger and she suffered injuries when the first boat collided with the second boat. This transpired under the direct operation and management of the two boat operators – the seventh defendant controlling the first boat and the eighth defendant piloting the second boat. The specific facts also indicated that such a collision between two vessels continuously in motion does not ordinarily happen without a breach of navigation safety, warning protocols or collision avoidance regulations. It self-evidently pointed to the negligence by one or both operators since prudent seamanship would have prevented the accident. Moreover, the specific cause of the accident was more readily known to the boat operators who were managing and steering their respective vessels prior to and at the point of the collision rather than an innocent, passive fare-paying passenger like Madam Tan. Hence, this warranted shifting the burden to the defendants to refute negligence by showing that even with all reasonable care and maritime skills, this collision would still have been inevitable. Failing which, liability must follow for breach of duty owed. (paras 42-45)

(2) The first to seventh defendants failed to establish that the accident was not caused by the negligence and breach of duty of care of the seventh defendant in his operation and control of the first boat owned by the first defendant's partnership business 'Hin Wong Huat Speed Boat', the partners of which were the first to seventh defendants. As a common carrier of fare-paying passengers of vessels like the first boat, owned by the first defendant, it was axiomatic that the seventh defendant helmsman owed a duty of reasonable care in the safe navigation of the first boat. This duty entailed proceeding at a safe speed commensurate with conditions, maintaining a proper lookout and visibility, avoiding collisions through adequate precautions, sounding warnings when necessary as well as adhering to regulations for right of way and hazard avoidance. The cumulative evidence presented made it patently obvious that, with prudent seamanship, foresight and compliance with navigational regulations, the collision was reasonably avoidable and not inevitable given: (i) the seventh defendant's admission that he was already aware that visibility was hindered by the obstructing ferry yet failed to reduce speed, sound warnings or keep any lookout; (ii) the testimony of a marine assistant ('DW5') with the Marine Department, Central Region, Port Klang confirming maritime rules required the first boat to give way to the second boat approaching from the right, which it failed to do; (iii) the proximity of the terminal and familiarity with potential visibility issues mandated extra caution in speed and steering

even allowing for buoyancy factors; and (iv) no evidence was shown that steering mechanisms had suddenly failed or other vessel issues arose warranting such loss of control. Therefore, unlike a situation of unforeseen calamity, there were no extraneous causes fully outside of the seventh defendant's control. (paras 51, 52, 56 & 57)

(3) Rule 6 of the Merchant Shipping (Collision Regulations) Order 1984 provided that 'Every vessel shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision …'. Among the factors to determine a safe speed were the visibility, traffic conditions, vessel manoeuvrability and hazards in the vicinity. On applying r. 6, there was overwhelming evidence affirming negligence and breach of safe speed principles by the operator of the first boat owned by the first to seventh defendants. *Ergo*, given the congested terminal berth, known visibility obstruction, heavy traffic and familiar depth/width constraints, operating the first boat at high unchecked speed exhibited negligence of the enshrined 'safe speed' principle under r. 6 as well as common sense seamanship, directly causing the unfortunate accident. Hence, the seventh defendant clearly breached his duty of care towards Madam Tan, a passenger, by violating the cardinal r. 6, attracting liability. The seventh defendant further failed to adhere to the International Regulations for Preventing Collisions at Sea 1972 as the following rules were breached: (i) r. 2 by neglecting to exercise the required caution and seamanship; (ii) r. 6 by failing to proceed at a safe speed, considering the prevailing circumstances; (iii) r. 16 by failing to yield the right of way to the second boat, which was entitled to maintain its course and speed; and (iv) r. 34 which mandated the sounding of a horn warning when approaching an area with obstructed visibility, a critical precaution that was not observed. These cumulative reckless breaches made it plainly foreseeable that precisely such an accident could occur. (paras 60-63, 65 & 66)

(4) There was no evidence substantiating negligence or imprudence by the eights defendant, the pilot, or the ninth defendant, the owner of the second boat. The accident was the disastrous outcome of negligent navigation by the first boat cutting across its path *sans* warning, for which the first to seventh defendants must shoulder culpability. As only the first to seventh defendants bore liability, the issue of vicarious liability shall be deliberated solely in relation to the defendants, excluding any consideration of the eighth and ninth defendants. The first to sixth defendants were vicariously liable for the seventh defendant's negligence as the first defendant was a partnership trading under the name 'Hin Wong Huat Speed Boat' and the registered owner of the first boat. Partners are considered agents of the partnership when carrying out the usual business or affairs of the partnership. As the seventh defendant was

operating the boat owned by the first defendant as its partner to ferry passengers at the time of the collision, this would be considered carrying out the usual business of the partnership. Therefore, the seventh defendant's negligence was imputed to the partnership and vicariously, to its partners, the second to sixth defendants. There was no requirement to prove an employer-employee relationship between a partnership and its own partners to establish vicarious liability. The partnership relationship itself where partners act as each other's agents is sufficient. (paras 74, 76, 79, 84)

(5) The plaintiffs were awarded: (i) general damages for: (a) pain and suffering and loss of amenities in the amount of RM200,000; (b) loss of future earnings in the amount of RM866,357.44; and (c) cost of future care in the amount of RM112,020; and (ii) special damages for: (a) cost of care from the date of the incident until the date of the filing of this suit, *ie*, from 15 August 2015 till 18 January 2019, in the amount of RM20,550; (b) medical costs (Sunway Medical Centre) in the amount of RM218,066.77; (c) medical costs (Pantai Hospital) in the amount of RM1,227.60; and (d) medical and psychiatrist report in the amount of RM2,400. The plaintiffs' claim for costs for traditional medicine and tuition and/or therapy was disallowed. (para 144)

Case(s) referred to:

Adnan Mat Jidin & Anor v. Irwan Wee Abdullah & Anor [1997] 3 CLJ 181 CA ***(refd)***
Dr Kok Choong Seng & Anor v. Soo Cheng Lin & Another Appeal [2017] 10 CLJ 529 FC ***(foll)***
Hasniyati Hassan & Anor v. Kerajaan Malaysia [2022] 7 CLJ 565 HC ***(refd)***
Henry Siang Len v. Universiti Kebangsaan Malaysia & Ors (Suit No WA-22NCVC-795-12-2016) (Unreported) ***(refd)***
Inas Faiqah Mohd Helmi v. Kerajaan Malaysia & Ors [2015] 3 CLJ 153 CA ***(refd)***
John Andrew Malthouse v. Cyril Steven & Ors [2014] 8 CLJ 461 HC ***(refd)***
Liong Thoo v. Sawiyah Hj Sirat & Ors [1981] CLJ 126; [1981] CLJ (Rep) 171 HC ***(foll)***
MA Clyde v. Wong Ah Mei & Anor [1970] CLJU 73; [1970] 1 LNS 73 FC ***(refd)***
Michael Vincent v. Mohanraj Sandran & Anor [2015] CLJU 689; [2015] 1 LNS 689 HC ***(refd)***
Ngooi Ku Siong & Anor v. Aidi Abdullah [1984] 2 CLJ 163; [1984] 1 CLJ (Rep) 294 FC ***(refd)***
Noorasmawati Abu Othman v. Kerajaan Malaysia & Ors [2021] CLJU 2028; [2021] 1 LNS 2028 HC ***(refd)***
Nur Syarafina Sa'ari v. Kerajaan Malaysia & Ors [2019] 9 CLJ 246 HC ***(refd)***
Sarawak Shell Bhd v. The Owners Or Other Persons Interested In The Ship Or Vessel The "Red Gold" & Another Case [2010] CLJU 999; [2010] 1 LNS 999 HC ***(refd)***
Yusnita Johari v. Dr Jerilee Mariam Khong & Ors [2023] 7 CLJ 89 HC ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 28A(2)(d)(ii)
Merchant Shipping (Collision Regulations) Order 1984, Schedule rr. 2, 6, 16, 34
Merchant Shipping Ordinance 1952, s. 517

For the plaintiffs - Jason Ng Kau & Sherlene Lai Yee Ling; M/s Jason Ng & Partners
For the 1st-7th defendants - Omar Kutty; M/s Kuah, Lim, Chin & Ooi
For the 8th & 9th defendants - Murad Ali Abdullah; M/s K'Mura & Co

Reported by Lina E

JUDGMENT

Atan Mustaffa Yussof Ahmad J:

[1] It was a balmy Saturday evening in August at Port Klang. The bustling jetty was alive with activity as the clock neared 6.15pm. Boats bobbed gently at their moorings, while passengers hurried to and fro. Among them was a woman waiting to board a boat for her journey. Little did she know that in mere moments, her life would be changed forever by a terrible collision on the water.

[2] Two speed boats, one piloted by one defendant and the other by another, were on a collision course. Perhaps it was haste, perhaps carelessness. Whatever the reason, in the blink of an eye, they crashed together with sickening force. The unfortunate passenger bore the brunt of the impact, suffering grievous head injuries that would rob her of her health, her career, and her independence.

[3] Now, she comes before this court, through her devoted husband, seeking justice and recompense for all she has lost. It falls to this court to unravel the events of that fateful evening, to determine who must bear responsibility for this tragic accident. At its heart, this is a case about a woman whose life was shattered in an instant, and who deserves to be made whole again.

Background Facts

[4] The events leading to the trial began on 15 August 2015, when a significant maritime collision occurred between two boats near Port Klang. On this day, the first plaintiff. Tan Wek Piau, ("Madam Tan") was a passenger on a boat registered as BPK 855P ("the first boat"). The boat, operated by the seventh defendant, was part of a fleet owned by the first defendant, a partnership trading under the name "Hin Wong Huat Speed Boat," with the second to seventh defendants being partners in this business. The boat was en route from Port Klang to Pulau Ketam when the incident took place.

[5] As the first boat was departing from Jeti Pelabuhan Klang ("the jetty"), it collided with another boat, registered as BPK 872P ("the second boat"). The second boat was operated by the eighth defendant. It was en route from Jeti Hailam, Port Klang, to Jeti Muhibbah, Port Klang, at the time of the incident.

[6] The collision was a result of both boats operating at high speeds, a fact later confirmed during the investigation. The first boat departed at an unusually high speed and took a route different from its usual path, moving closer to a nearby ferry. Meanwhile, the second boat, approached the area, leading to the collision. The operator of the second boat claimed that the first boat had suddenly entered its path without proper signalling or ensuring a clear passage, which contributed to the incident.

[7] Following the collision, Madam Tan sustained life-threatening injuries, particularly severe head trauma. These injuries included a left temporal hemorrhage, subarachnoid hemorrhage, fractures of the temporal bone, and cerebral edema. Madam Tan was initially treated at Hospital Tengku Ampuan Rahimah, where emergency surgeries were performed to manage the critical condition. Madam Tan was later transferred to Sunway Medical Centre for further treatment and recovery. Despite the extensive medical care, Madam Tan continued to suffer from significant cognitive and speech impairments, as well as physical limitations.

[8] The second plaintiff, Madam Tan's husband, Heng Tong Xhau @ Chia Tong Hau, is appointed as her litigation representative. This appointment was made pursuant to an order dated 8 October 2018 by the court. The role of the second plaintiff is to represent Madam Tan in the legal proceedings due to her inability to manage her own affairs as a result of the severe injuries sustained from the collision.

Parties' Respective Cases

The Plaintiffs' Pleaded Case

[9] The plaintiffs' case is summarised below.

[10] The collision was caused by the negligence of the seventh defendant and/or eighth defendant in operating their respective speed boats. Particulars of negligence are pleaded against both operators, including failing to maintain safe distances, failing to give proper warnings/signals, failing to give way, failing to comply with maritime regulations, failing to take evasive action, *etc*.

[11] As a result of the collision, Madam Tan suffered serious head injuries and was hospitalised. She was diagnosed with various brain injuries, including hemorrhages, fractures and cerebral edema. This resulted in severe cognitive and speech impairments.

[12] The first to sixth defendants are vicariously liable for the negligence of the seventh defendant as the operator of the first boat. The ninth defendant is vicariously liable for the negligence of the eighth defendant as the owner of the second boat.

[13] Due to her injuries, Madam Tan lost her ability to work as an accountant at two companies where she was previously employed. She claims loss of future earnings from the date her employment was terminated until her retirement age.

[14] The plaintiffs rely on the doctrine of *res ipsa loquitur* against the defendants.

[15] The plaintiffs claim the following in this action:

(i) general damages against all defendants.

(ii) special damages amounting to RM2,034,621.43, broken down as follows:

(a) loss of income from 31 October 2017 to 3 January 2034: RM1,553,066.67;

(b) damage to personal belongings: RM7,000 (withdrawn before the trial);

(c) medical expenses at Sunway Medical Centre: RM218,066.77;

(d) medical expenses at Pantai Hospital: RM1,227.60;

(e) expenses for traditional medicine: RM24,065.72;

(f) expenses for attending special tuition/therapy: RM7,028;

(g) estimated care and house cleaning costs from 15 August 2015 to 3 January 2034: RM220,666.67;

(h) transportation expenses: RM900 (withdrawn before the trial);

(i) police report: RM200 (withdrawn before the trial);

(j) medical and psychiatric reports: RM2,400.

(iii) an order that all defendants jointly and/or severally pay the damages to be assessed and awarded by the court.

(iv) that the judgment sum and costs awarded to the plaintiffs be paid within 14 days from the date of judgment.

(v) costs of the action.

(vi) interest at the rate of 5% per annum accruing on the amount of damages and costs from the date of filing of the suit until the date of full and final settlement.

The First To Seventh Defendants' Case

[16] The first to seventh defendants deny any liability for the accident and claim that it was caused entirely by the negligence of the eighth and/or ninth defendants.

[17] They assert that on 15 August 2015, at around 6.15pm, as the first boat was departing from the jetty, it was struck forcefully and at high speed by the second boat operated by the eighth defendant. The collision and impact were caused by the eighth defendant while operating the second boat.

[18] They claim the collision occurred when the second boat headed towards the right side of the first boat near its rear, where the front of the second boat collided with the first boat, causing injury to Madam Tan and damage to the first boat.

[19] The first to seventh defendants strongly assert that the accident was caused by the negligence and/or carelessness of the eighth defendant in driving, controlling, steering and/or managing the second boat, resulting in the collision with the first boat.

[20] They deny all allegations of negligence against them by the plaintiffs. Instead, they provide detailed particulars of negligence against the eighth and/or ninth defendants, including driving at excessive speed, failing to keep a proper lookout, failing to give proper signals, driving recklessly, failing to take evasive action, and failing to comply with maritime regulations.

[21] The first to seventh defendants deny that vicarious liability applies in this boat collision situation.

[22] They claim that as a result of the accident caused by the eighth defendant, the first to seventh defendants suffered losses and damages amounting to RM2,727.36 for repairs to the first boat.

[23] They deny knowledge of and do not admit to the plaintiffs' claims and allegations regarding Madam Tan's injuries and damages.

The Eighth And Ninth Defendants' Case

[24] The eighth and ninth defendants deny all liability for the accident and assert that it was caused entirely by the negligence of the operator of the first boat.

[25] They state that on 15 August 2015, around 6pm, the eighth defendant was operating the second boat departing from Jeti Bagan Hailam Port Klang with two passengers, heading towards Jeti Muhibbah Port Klang.

[26] They claim that the second boat had the right of way to cross the jetty area as it was already in transit. The eighth defendant was driving at low speed due to the small size and low horsepower of the second boat.

[27] As the second boat was lawfully crossing the jetty waters, the eighth defendant suddenly saw the first boat rushing out at high speed directly towards the path of the second boat.

[28] The eighth defendant quickly took action to slow down the second boat's engine and attempted to reverse to avoid collision, but the much larger and more powerful first boat collided with the second boat due to its high speed and reckless operation.

[29] They assert that the first boat was negligent in exiting at high speed from the anchor area without sounding its horn and violating the second boat's right of way.

[30] The eighth and ninth defendants deny any negligence on their part and put forth that the eighth defendant at all material times operated the second boat carefully, diligently, and in full compliance with all maritime regulations.

[31] They claim that the ninth defendant, as the registered owner of the second boat, is not liable for any claims by the plaintiffs, either directly or vicariously.

[32] The eighth and ninth defendants assert that the plaintiffs' claim to enforce their action is time-barred under the Merchant Shipping Ordinance 1952 as it was filed more than two years from the date of the cause of action.

[33] They argue that the plaintiffs' special damages claim of RM2,034,612.43 is incorrectly calculated and includes future care costs up to 2034, which should not be allowed as special damages. They contend this was deliberately done to bring the case within the High Court's jurisdiction.

Witnesses

[34] Six witnesses appeared for the plaintiffs as follows:

(i) PW1 is Dr Ravi a/l S Krishnapillai ("Dr Ravi"), a consultant neurosurgeon at Sunway Medical Centre. He was the treating consultant neurosurgeon for Madam Tan. He provided medical care and performed multiple surgeries to treat her life-threatening injuries. His testimony in the case focused on describing Madam Tan's condition, the treatments she received, and the long-term impacts of her injuries.

(ii) PW2 is Syed Sahrel bin Wan Mahbar, a RELA officer with Terminal South Point, Pelabuhan Klang. His testimony centred on his observations during the boat collision incident on 15 August 2015 and his actions in relation to the incident. His witness statement is marked as "WS-PW2".

(iii) PW3 is Madam Tan's husband and legal representative, Heng Tong Hau @ Chia Tong Hau, a shareholder and director of Kyoshin Heat Treatment Sdn Bhd and Hi-Point Impex Sdn Bhd. His evidence was on the aftermath of the boat collision on 15 August 2015, where his wife sustained severe injuries. He detailed the sequence of events following

A the incident, including his wife's medical treatment, the financial expenses incurred, and the long-term impact on her cognitive and speech abilities. He also explained his role in managing her affairs due to her incapacitation and the legal actions taken to seek compensation for the damages and injuries she suffered. His witness statement is marked as B "WS-PW3".

(iv) PW4 is Dr Bharathi S Vengadasalam ("Dr Bharathi"), a consultant psychiatrist with Pantai Hospital Kuala Lumpur. She was the consultant psychiatrist who evaluated Madam Tan, following her traumatic brain injury from the boat collision. Her evidence was on the neurocognitive C assessment of Madam Tan, focusing on the cognitive deficits she experienced as a result of a traumatic brain injury, which led to a major neurocognitive disorder, affecting her daily functioning and ability to perform complex tasks. Dr Bharathi also evaluated Madam Tan's prospects for recovery, concluding that her cognitive impairments were D likely permanent given the time elapsed since the injury.

(v) PW5 is Suhadi bin Mat, an assistant superintendent of police (ASP) with the Royal Malaysian Police ("PDRM"), specifically with the Marine Police Force at the Klang Operations Base. His evidence was on the investigation of the boat collision incident, focusing on the causes of the E accident, including the speed of the boats involved and the conditions around the South Port Terminal on the day of the incident.

(vi) PW6 is Zamri bin Sa'an, an Operations Inspector from PDRM. His evidence was on the continuation of the investigation into the boat collision incident, following up on PW5's initial findings, and F compiling evidence from the scene and witnesses involved in the case.

[35] One witness appeared for the first to seventh defendants which is DW2, Tan Asiang, who is a boat driver/operator for leisure and tourism purposes and a partner in Hin Wong Huat Speed Boat, the first defendant. His evidence was on his involvement in the boat collision on 15 August G 2015, where he testified that he was operating the first boat, described the events leading to the collision, and explained that he was unable to avoid the oncoming boat due to its high speed and sudden appearance from behind a ferry.

H **[36]** Five witnesses appeared for the eighth and ninth defendants as follows:

(i) DW1 is the ninth defendant, Mohamad Aris bin Mohd Isa, who previously was involved in managing his boat taxi service. His evidence was on his involvement in the boat incident, where he testified that he rented his boat to the eighth defendant, Rosli bin Mohamad Monir I (DW6), who was operating the boat during the collision, and explained that DW6 was not his employee but a professional hired on commission. His witness statement is marked as "WS-DW1".

(ii) DW3 is Mohamad Khairuddin bin Abdullah Tahir, a sales executive with Pembekal Seri Lengkap Sdn Bhd. His evidence was on his experience as a passenger on the second boat, where he described the normal speed and behaviour of the boat operator during the incident, the sudden appearance of a larger boat that crossed their path, and the subsequent collision. His witness statement is marked as "WS-DW3".

(iii) DW4 is Zaidi bin Ahmad, a storekeeper with Power M Motion Control. His evidence was on his experience as a passenger on the second boat during the collision on 15 August 2015, where he described the normal speed and behaviour of the boat operator, the sudden appearance of a larger boat that crossed their path, and the events immediately following the collision. His witness statement is marked as "WS-DW4".

(iv) DW5 is Abdul Malek bin Abdul Hamid, a marine assistant with the Marine Department, Central Region, Port Klang. His evidence was on the regulations governing maritime traffic and his opinion that the larger first boat, which collided with the smaller second boat, violated maritime rules by failing to give the right of way and using an inappropriate route, thereby contributing to the accident. His witness statement is marked as "WS-DW5".

(v) DW6 is the eighth defendant, Rosli bin Mohamad Monir, self-employed boat helmsman (Malim 2) who rents boats for income. His evidence was on the events of 15 August 2015, where he described how he was navigating the second boat with two passengers when the first boat suddenly and improperly crossed their path at high speed, leading to a collision. His witness statement is marked as "WS-DW6".

Issues

[37] From the facts of the case, defences relied on by the defendants and the submissions of parties, the court frames the following issues for deliberation, which this court considers pivotal to the determination of liability in this action:

(i) whether the doctrine of *res ipsa loquitur* applies in this case to shift the burden of proof to the seventh and eighth defendants to rebut the presumption of negligence;

(ii) whether the seventh defendant was negligent in his operation and control of the first boat;

(iii) whether the eighth defendant was negligent in his operation and control of the second boat;

(iv) whether the first to sixth defendants are vicariously liable if the seventh defendant is found to be negligent; and

(v) whether the ninth defendant is vicariously liable if the eighth defendant is found to be negligent.

[38] In the event that the court finds the first to seventh defendants and/or the eighth and ninth defendants liable for the collision and the resulting injuries suffered by the plaintiffs, this court will proceed to conduct an assessment of damages. This assessment will be undertaken to determine the appropriate quantum of compensation that should be awarded to the plaintiffs, taking into account the nature and extent of the injuries, the loss of future earnings, the cost of future care, and any other relevant factors that may arise from the evidence presented.

Analysis And Findings Of The Court

Liability

Res Ipsa Loquitor

[39] The plaintiffs submitted that the doctrine of *res ipsa loquitur* should apply in this case to shift the burden of proof onto the defendants. They argued that the collision between the two boats, which resulted in the injuries sustained by Madam Tan, occurred under the management and control of the seventh and eighth defendants. According to the plaintiffs, such a collision would not ordinarily happen without negligence or a breach of duty by those in control of the vessels. They emphasised that the specific cause of the accident is better known to the boat operators, rather than to Madam Tan, who was merely a passive passenger. Therefore, the plaintiffs contended that it is appropriate to presume negligence on the part of the defendants, unless they can prove that the collision would have been unavoidable even with the exercise of reasonable care and maritime skill.

[40] The first to seventh defendants submitted that the doctrine of *res ipsa loquitur* should not apply in this case. They argued that the circumstances surrounding the collision do not automatically imply negligence on their part. The first to seventh defendants contended that there were multiple factors at play, including the actions of the eighth defendant, that could have contributed to the accident. They emphasised that the collision may have occurred due to reasons beyond their control and without any breach of duty on their part. Therefore, they argued that the burden of proof should remain with the plaintiffs to establish negligence, rather than shifting it to the defendants under the doctrine of *res ipsa loquitur*.

[41] The eighth and ninth defendants submitted that the doctrine of *res ipsa loquitur* should not be applied to shift the burden of proof onto them. They argued that the collision between the two boats does not inherently indicate negligence on their part and that the circumstances surrounding the incident were not solely under their control. The eighth and ninth defendants emphasised that the actions of the seventh defendant, who was operating the other boat, could have been a contributing factor to the collision. They contended that there were potential external factors or unforeseeable events

that could explain the accident without implying negligence on their part. Consequently, they argued that the plaintiffs should bear the burden of proving negligence, rather than relying on the doctrine of *res ipsa loquitur* to shift this burden onto them.

[42] Indeed, the first consideration of the court is as to whether the doctrine of *res ipsa loquitor* is applicable to shift the burden of proof to the defendants to rebut the presumption of negligence. As set out in the Federal Court decision of *MA Clyde v. Wong Ah Mei & Anor* [1970] CLJU 73; [1970] 1 LNS 73; [1970] 2 MLJ 183, this doctrine applies when an accident occurs under the management of the defendant(s) and the facts demonstrate that such an accident does not ordinarily happen without negligence or breach of duty. Here, it is undisputed that Madam Tan as a passenger suffered injuries when the first boat collided with the second boat. This transpired under the direct operation and management of the two boat operators – the seventh defendant controlling the first boat and the eighth defendant piloting the second boat.

[43] The specific facts also indicate that such a collision between two vessels continuously in motion does not ordinarily happen without a breach of navigation safety, warning protocols or collision avoidance regulations. It self-evidently points to negligence by one or both operators since prudent seamanship would have prevented the accident.

[44] Moreover, as correctly submitted by the plaintiffs, the specific cause of the accident is more readily known to the boat operators who were managing and steering their respective vessels prior to and at the point of collision rather than an innocent, passive fare-paying passenger like Madam Tan.

[45] Hence, in line with the established legal doctrine, this warrants shifting the burden to the defendants to refute negligence by showing that even with all reasonable care and maritime skill, this collision would still have been inevitable. Failing which, liability must follow for breach of duty owed.

[46] Therefore, based on the factual matrix where an injured passenger, Madam Tan, suffered harm from a collision between boats piloted by the seventh defendant and eighth defendant, the prerequisites for invoking the maxim of *res ipsa loquitur* are clearly satisfied, mandating a rebuttable presumption of negligence against the defendants.

[47] In the circumstances, I would uphold the plaintiffs' contention that this doctrine squarely applies to shift the burden of proof onto the defendants in disproving negligence.

Negligence Of The First To Seventh Defendants

[48] The plaintiffs submitted that the first to seventh defendants, particularly the seventh defendant, were negligent in their operation and control of the first boat. They argued that the seventh defendant failed to

maintain a safe speed, did not keep a proper lookout, and neglected to follow essential maritime regulations, such as sounding a warning horn and yielding the right of way to the second boat. The plaintiffs emphasised that the seventh defendant's actions, including setting the boat in motion at a high speed from a busy terminal without adequate precautions despite obstructed visibility, constituted clear breaches of duty. They further argued that these breaches directly led to the collision, which could have been avoided if the seventh defendant had exercised reasonable care. Therefore, the plaintiffs contended that the negligence of the first to seventh defendants was the proximate cause of the accident and the resulting injuries to Madam Tan.

[49] The first to seventh defendants submitted that they were not negligent in the operation and control of the first boat. They argued that the accident was not caused by any breach of duty on the part of the seventh defendant, who was operating the boat. The defendants contended that the circumstances leading to the collision, including the presence of the obstructing ferry and the actions of the eighth defendant operating the second boat, played a significant role in the incident. They maintained that the seventh defendant acted within reasonable bounds, and any claim of negligence was unsupported by the evidence. The first to seventh defendants further argued that the collision might have been an inevitable accident due to factors beyond their control, and therefore, they should not be held liable for the incident or the injuries sustained by Madam Tan.

[50] The eighth and ninth defendants submitted that the negligence of the first to seventh defendants, specifically the seventh defendant, was the primary cause of the collision. They argued that the seventh defendant failed to operate the first boat at a safe speed and did not maintain a proper lookout, despite knowing that visibility was obstructed by a docked ferry. The eighth and ninth defendants emphasised that the seventh defendant did not adhere to maritime regulations, particularly the requirement to give way to the second boat, which was approaching from the right and had the right of way. They contended that if the seventh defendant had exercised the necessary caution, including reducing speed and following collision avoidance protocols, the accident could have been avoided. Therefore, the eighth and ninth defendants argued that the liability for the collision and the resulting injuries to Madam Tan lies with the first to seventh defendants due to their negligence.

[51] On the evidence, I find that the first to seventh defendants have failed to establish that the accident was not caused by the negligence and breach of duty of care of the seventh defendant, Tan Asiang, in his operation and control of the first boat owned by the first defendant partnership business "Hin Wong Huat Speed Boat", the partners of which are the first to seventh defendants.

[52] As a common carrier of fare-paying passengers of vessels like the first boat owned by the first defendant, it was axiomatic that the seventh defendant helmsman owed a duty of reasonable care in the safe navigation of the first boat. This duty entailed proceeding at a safe speed commensurate with conditions, maintaining proper lookout and visibility, avoiding collisions through adequate precautions, sounding warnings when necessary as well as adhering to regulations for the right of way and hazard avoidance.

[53] However, eyewitness evidence from multiple parties including PW2 Syed Sahrel, the RELA officer on duty at Jeti Muhibbah, irrefutably confirms several crucial breaches of this duty by the seventh defendant. Firstly, he set the first boat in motion from a busy terminal without an appropriately cautious reduced speed or any warning horn despite knowing visibility was obstructed by a large, docked ferry. Approaching a virtual blind intersection at high velocity severely heightened the chances of collision. Moreover, from PW2's vantage point and the admissions of the seventh defendant himself, it is evident that the operator lost situational awareness, only noticing the second boat when a precarious 30 feet distance remained, indicating a drastic failure to maintain vigilant proper lookout expected of a prudent vessel handler.

[54] Furthermore, the presence of the visibility-hindering ferry, though an extenuating factor, cannot fully exculpate gross negligence by the seventh defendant, the helmsman of the first boat. All maritime codes, regulations and practice norms categorically impose a duty on vessel operators to navigate with greater care and at creep speeds in the prevailing sightline conditions to forestall mishaps through collision avoidance, safe manoeuvring room or early warning to others. Yet, the seventh defendant saw fit to act contrarily with devastating consequences.

[55] Any claim of inevitable accident by the first to seventh defendants, is untenable. As clearly set out in the instructive case of *Sarawak Shell Bhd v. The Owners Or Other Persons Interested In The Ship Or Vessel The "Red Gold" & Another Case* [2010] CLJU 999; [2010] 1 LNS 999; [2011] 1 MLJ 239, the defence of inevitable accident requires showing that the accident could not have been avoided or prevented despite the defendant taking all reasonable precautions and care.

[56] Here, the cumulative evidence presented makes it patently obvious that with prudent seamanship, foresight and compliance with navigational regulations, this collision was reasonably avoidable and not inevitable given:

(i) the seventh defendant's admission that he was already aware that visibility was hindered by the obstructing ferry yet failed to reduce speed, sound warnings or keep any lookout.

(ii) testimony of DW5 confirming maritime rules required the first boat to give way to the second boat approaching from the right which it failed to do.

(iii) the proximity of the terminal and familiarity with potential visibility issues mandated extra caution in speed and steering even allowing for buoyancy factors.

(iv) no evidence was shown that steering mechanisms had suddenly failed or other vessel issues arose warranting such loss of control.

[57] Therefore, unlike a situation of unforeseen calamity, there were no extraneous causes fully outside the seventh defendant's control. As multiple reasonable precautions against foreseeable hazards were available but consciously ignored, I cannot accept that this was an 'inevitable accident'. Rather, it represents a preventable mishap arising from negligence and disregard of collision avoidance mandates.

[58] Moreover, the evidence of both eyewitnesses PW2 and DW5 Abdul Malek, marine assistant with the Central Region Maritime Department in Port Klang, establish that maritime regulations required the first boat to give way to any crossing vessel approaching from its right, namely the second boat, operated by the eighth defendant which enjoyed the right of way.

[59] Yet, the first boat negligently crossed directly into the path of the second boat, the privileged vessel, instead of yielding the right of way compounded by excessive speed, lack of warning and known visibility issues.

[60] Based on r. 6 of the Schedule of the Merchant Shipping (Collision Regulations) Order 1984 as incorporated into Malaysian law by the Merchant Shipping (Collision Regulations) Order 1984, the first to seventh defendants were negligent. Rule 6 of the maritime regulations expressly stipulates that:

> Every vessel shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision ...

[61] Among the factors to determine a safe speed are the visibility, traffic conditions, vessel manoeuvrability and hazards in the vicinity.

[62] On applying r. 6, there is overwhelming evidence affirming negligence and breach of safe speed principles by the operator of the first boat (the seventh defendant) owned by the first to seventh defendants *viz*:

(i) Abdul Malek (DW5) asserted that both boats were moving at high speeds without situational awareness, precluding collision avoidance unlike if operating at reduced prudent speed.

(ii) the investigation of PW5, ASP Suhadi bin Mat, the marine investigation officer at the material time, and PW2 Syed Sahrel's testimony concurred that the first boat moved off from the jetty at excessive speed.

(iii) the seventh defendant himself admitted he did not notice the second boat until it was barely 30 feet away, exhibiting poor speed control and lookout.

(iv) "safe speed" under r. 6 entails proceeding slowly enough to fully appraise traffic and visibility conditions before committing to a course or undertaking manoeuvres.

[63] *Ergo*, given the congested terminal berth, known visibility obstruction, heavy traffic and familiar depth/width constraints, operating the first boat at high unchecked speed exhibited negligence of the enshrined "safe speed" principle under r. 6 as well as common sense seamanship, directly causing the unfortunate accident.

[64] Hence, the seventh defendant clearly breached his duty of care towards Madam Tan passenger safety by violating the cardinal r. 6, attracting liability.

[65] From the evidence, it is clear to the court that the seventh defendant, who operated the first boat, violated several key maritime regulations, which materially contributed to the collision in question. Specifically, he failed to adhere to the International Regulations for Preventing Collisions at Sea 1972 (COLREGs). The first boat breached r. 2 by neglecting to exercise the required caution and seamanship, r. 6 by failing to proceed at a safe speed considering the prevailing circumstances, and r. 16 by failing to yield the right of way to the second boat, which was entitled to maintain its course and speed. Moreover, the first boat did not comply with r. 34, which mandates the sounding of a horn warning when approaching an area with obstructed visibility, a critical precaution that was not observed. These breaches of maritime regulations by the seventh defendant constitute clear negligence and were a direct cause of the collision.

[66] I accept the plaintiffs' submission that these cumulative reckless breaches make it plainly foreseeable that precisely such an accident could occur. While buoyancy factors and limited evasive options due to close proximity also played a role, the fact remains that the accident would likely have been avoided if the seventh defendant exercised reasonable care and skill in prudent speed, hazard alertness, warnings and adherence to regulations regarding priority vessels.

No Negligence Of The Eighth And Ninth Defendants

[67] The plaintiffs submitted that the eighth and ninth defendants were not free from negligence in the collision. They argued that, despite the second boat being in its designated lane, the eighth defendant, as the operator, had a duty to take evasive action upon sighting the first boat to prevent the accident. The plaintiffs contended that the eighth defendant failed to exercise sufficient caution or take timely measures to avoid the collision, even though

he had the right of way. They emphasised that the eighth defendant's response was inadequate given the circumstances, and therefore, the eighth and ninth defendants should share in the liability for the resulting damages.

[68] The first to seventh defendants submitted that the eighth and ninth defendants were not free from negligence in the collision. They argued that while the second boat was in its designated lane, the eighth defendant, as the operator of the second boat, had a responsibility to exercise greater caution and take evasive action to avoid the collision once the first boat became visible. The first to seventh defendants contended that the eighth defendant failed to adequately respond to the sudden appearance of the first boat, which they argue contributed to the accident. They asserted that had the eighth defendant taken more immediate or effective action, the collision might have been avoided, and therefore, the eighth and ninth defendants should also bear some responsibility for the incident.

[69] The eighth and ninth defendants submitted that they were not negligent in the collision and should not be held liable. They argued that the second boat, operated by the eighth defendant, was navigating within its designated lane at a safe speed and in accordance with maritime regulations when the collision occurred. The eighth and ninth defendants emphasised that the root cause of the accident was the reckless and unexpected manoeuvre of the first boat, which cut across the path of the second boat without warning. They further contended that, given the closing distance and speed, the eighth defendant had little to no time to take effective evasive action. Despite this, the eighth defendant did throttle down and attempt to change direction, demonstrating reasonable care under the circumstances. Therefore, the eighth and ninth defendants argued that they were not at fault and that the liability for the collision rests solely with the first to seventh defendants.

[70] As for the eighth and ninth defendants, the entire factual matrix as corroborated by multiple eyewitnesses confirms that the second boat driven by the eighth defendant which was owned by the ninth defendant was consistently traversing its designated shipping lane towards Jeti Muhibbah in an appropriate cautious manner when the collision occurred.

[71] The testimony of passengers aboard the second boat, Mohamad Khairuddin bin Abdullah Tahir (DW3) and Zaidi bin Ahmad (DW4), is unanimous that the eighth defendant, Rosli bin Mohamad Monir (DW6), piloted the vessel in a normal, safe fashion along its charted course without any excessive speed or conduct violations. DW5 also concurred that the established path aligns with prudent seamanship given surrounding depths and widths. Hence, in the absence of contravening proof, rash speed or recklessness arguments appear unjustly aimed at the eighth and ninth defendants.

[72] Furthermore, according to consistent eyewitness accounts, the root cause of the accident was the first boat operated by the seventh defendant unexpectedly cutting perpendicularly across the right of way of the second boat from a blind jetty exit spot in a reckless hastened manner without warning. This view was echoed by maritime regulatory authorities as a cardinal infringement of navigational norms. It is well-accepted that the privileged boat lawfully underway enjoys the right of way over intersecting vessels expected to give way (r. 16 of COLREGs), which the first boat failed to do thereby precipitating the collision.

[73] Finally, some argument has been tendered that the eighth defendant ought to have undertaken evasive manoeuvres on sighting the first boat to prevent mishap. However, DW5 has clarified that the closing velocity and distance left negligible reaction time in the circumstances, rendering collision unavoidable. In fact, testimony shows the eighth defendant did immediately throttle down and try to change direction, confirming reasonable care was undertaken. With prudent speed and right of way already established, further burdens cannot be imposed.

[74] Thus, on careful perusal, there is no evidence substantiating negligence or imprudence by the eighth defendant pilot or ninth defendant owner of the second boat. The accident was the disastrous outcome of negligent navigation by the first boat cutting across its path *sans* warning, for which the first to seventh defendants must shoulder culpability.

[75] For completeness, the eighth and ninth defendants raised a limitation argument, contending that the plaintiffs' suit was time-barred under s. 517 of the Merchant Shipping Ordinance 1952, which imposes a two-year limitation period for bringing actions related to damages caused by collisions between vessels. They argued that since the incident occurred on 15 August 2015 and the suit was only filed on 18 January 2019, the action should be dismissed as it was initiated outside the statutory period. However, given the court's finding that the eighth and ninth defendants are not liable for the collision, it is unnecessary for the court to consider this limitation argument. The question of whether the claim was brought within the permissible time frame does not arise as no liability has been established against these defendants.

Vicarious Liability

[76] With the court having determined that only the first to seventh defendants bear liability, the issue of vicarious liability shall be deliberated solely in relation to these defendants, excluding any consideration of the eighth and ninth defendants.

[77] The plaintiffs submitted that the first to sixth defendants are vicariously liable for the negligence of the seventh defendant, who was operating the first boat at the time of the collision. They argued that the

seventh defendant was acting as an agent of the first defendant partnership, "Hin Wong Huat Speed Boat," in the course of its usual business of ferrying passengers. The plaintiffs emphasised that under the legal principle of vicarious liability, specifically the doctrine of *qui facit per alium, facit per se* ("he who acts through another is deemed to have acted himself"), the partnership and its partners (the second to sixth defendants) are responsible for the negligent actions of the seventh defendant. The plaintiffs contended that there is no need to establish an employer-employee relationship between the partnership and the seventh defendant, as the partnership structure inherently makes the partners agents of each other when carrying out partnership business. Therefore, they argued that the first to sixth defendants should be held liable for the seventh defendant's negligence.

[78] The first to seventh defendants submitted that the plaintiffs failed to establish vicarious liability against the first to sixth defendants for the actions of the seventh defendant. They argued that the plaintiffs did not prove that the seventh defendant was an agent or employee of the first defendant partnership, "Hin Wong Huat Speed Boat," or that there was any contract of service or employment relationship between the seventh defendant and the first defendant. The defendants contended that without such proof, the principle of vicarious liability should not apply. They maintained that the plaintiffs needed to demonstrate a formal employer-employee relationship to hold the first to sixth defendants liable for the seventh defendant's actions, which the plaintiffs did not do. Therefore, they argued that the first to sixth defendants should not be held responsible for the alleged negligence of the seventh defendant.

[79] After considering the submissions, the court finds that the first to sixth defendants are vicariously liable for the seventh defendant's negligence as the first defendant is a partnership trading under the name "Hin Wong Huat Speed Boat" and the registered owner of the first boat. The second to seventh defendants are the partners that form the first defendant partnership.

[80] The seventh defendant was operating the first boat as an agent of the first defendant partnership at the time of the collision.

[81] There is legal precedent establishing vicarious liability – the principle of "*qui facit per alium, facit per se*" meaning "he who acts through another is deemed to have acted himself." As stated in *Adnan Mat Jidin & Anor v. Irwan Wee Abdullah & Anor* [1997] 3 CLJ 181; [1997] 2 MLJ 775, "the legal principle of vicarious liability for the negligent driving of a car by another person is the principle *qui facit per alium, facit per se*." Based on this principle, the owner of a vehicle is vicariously liable for the negligence of someone they permitted, authorised or requested to drive the vehicle on their behalf or as their agent.

[82] Since the seventh defendant was operating the first boat owned by the first defendant partnership as a partner of that partnership at the time of the collision, the first defendant partnership and the other partners (second to sixth defendants) are vicariously liable for the seventh defendant's negligence in operating the boat.

[83] The first to seventh defendants argued that the plaintiffs failed to prove the seventh defendant was an agent or employee of the first defendant or that there was any contract of service or employment relationship between the seventh defendant and first defendant to establish vicarious liability.

[84] However, partners are considered agents of the partnership when carrying out the usual business or affairs of the partnership. As the seventh defendant was operating the boat owned by the first defendant partnership as its partner to ferry passengers at the time of the collision, this would be considered carrying out the usual business of the partnership. Therefore, the seventh defendant's negligence is imputed to the partnership and vicariously to its partners, the second to sixth defendants. There is no requirement to prove an employer-employee relationship between a partnership and its own partners to establish vicarious liability. The partnership relationship itself, where partners act as each other's agents is sufficient.

[85] Hence, the court finds that the accident was wholly caused by negligence and breach of duty of care by the seventh defendant first boat operator. This was the direct result of multiple breaches of duty by the steerer of the first boat across various facets of safe seamanship and collision prevention norms, for which the first to seventh defendants must shoulder full liability.

[86] In the premises, liability is found only against the first to seventh defendants.

General Damages

Pain And Suffering And Loss Of Amenities

[87] The plaintiffs submitted that general damages of RM400,000 should be awarded for Madam Tan's pain and suffering and loss of amenities, as Madam Tan suffered severe head injuries as a result of the collision, requiring multiple neurosurgical operations. She was in a life-threatening condition due to elevated pressure in her brain. Madam Tan suffered from residual cognitive and speech impairments that were likely to be permanent based on medical assessments. She experienced issues with memory, concentration, calculation, and behavioural changes. The plaintiffs submitted that awards in recent cases involving similarly severe brain injuries had ranged from RM385,000 to RM500,000. As such, the plaintiffs contended that RM400,000 was reasonable compensation for the pain, suffering, and permanent disability faced by Madam Tan due to the negligence of the first to seventh defendants.

[88] The first to seventh defendants submitted that the court could not determine the current health condition and the extent of Madam Tan's alleged permanent disability, if any. The said defendants argued that the plaintiffs had failed to adduce sufficient evidence to enable an accurate assessment of the first plaintiff's existing condition, as the medical reports presented relied on stale examinations conducted in 2018 or earlier. Further, the said defendants contended that the traumatic brain injury sustained by Madam Tan was moderate, based on her Glasgow Coma Scale score of 9/15. As such, the said defendants argued that recent comparable case law demonstrated that an award of RM80,000 would be reasonable compensation for a moderate brain injury, which is lower than the RM400,000 sought by the plaintiffs.

[89] The court's analysis and finding are as below.

[90] I have considered the evidence regarding Madam Tan's injuries and resultant deficits to determine the appropriate quantum for pain, suffering and loss of amenities. Medical experts, namely neurosurgeon Dr Ravi (PW1) and psychiatrist Dr Bharathi (DW4), who assessed Madam Tan on 6 March 2019 and 2 March 2017, respectively, concur that she endures residual speech, cognitive and functional impairments with poor recovery prospects, consequent to her traumatic brain injury sustained in the 15 August 2015 accident.

[91] While the injuries are grievous, I am mindful that the High Court in *Yusnita Johari v. Dr Jerilee Mariam Khong & Ors* [2023] 7 CLJ 89; [2023] 9 MLJ 629 awarded RM400,000 general damages to a paraplegic plaintiff with severe permanent disabilities. As Madam Tan here retains independent mobility, an equivalent award would be disproportionate. Her pleaded Glasgow Coma Scale score of 9/15 likewise confirms moderate traumatic brain injury. Reliance on *Henry Siang Len v. Universiti Kebangsaan Malaysia & 17 Ors* in Kuala Lumpur High Court (Suit No WA-22NCVC-795-12 of 2016) (unreported) where RM500,000 was awarded is accordingly inappropriate given the plaintiff's vegetative diagnosis. I also considered *Michael Vincent v. Mohanraj Sandran & Anor* [2015] CLJU 689; [2015] 1 LNS 689; [2016] 8 MLJ 426, which awarded a lower RM80,000 for moderate traumatic brain injury. However, there the opinion of the respondent's specialist suggested that the residuals would be resolved within two years.

[92] As such, I turn to the Compendium of Personal Injury Awards (revised 6 July 2018) guidelines for reasonable compensation aligned to prove affliction. Though personality and behavioural changes are evident from medical testimony, these appear modest when juxtaposed against intellectual diminishment warranting focus. Having evaluated the duration of persisting sequelae, their impact on functioning and the absence of further plateau as explained by both experts, I assess Madam Tan's condition to be one of

moderate permanent neurocognitive impairment falling mid-range of the RM60,000 to RM180,000 bracket that the quantified guidance prescribes therefor.

[93] Applying likewise the parameters for associated memory loss the compendium specifies, and giving due regard to findings regarding concentration compromised, further damages of RM40,000 to RM50,000 is appropriate. Adjusting similarly for reduced behavioural temperance yet avoiding duplication, her psychological sequelae are adequately recompensed in the global sum that follows representing reasonable redress calculated based on her losses and responsibilities attributable to the said defendants' negligence established on evidence. Therefore, under the head of general damages for pain, suffering and loss of amenities vital to requisite restorative justice, I allow rounded compensation of RM200,000 to the plaintiffs.

Loss Of Future Earnings

[94] The plaintiffs submitted that Madam Tan was entitled to loss of future earnings based on her net annual income of RM91,195.52 in 2014, one year before the incident in 2015. The plaintiffs further submitted that at the time of the incident, Madam Tan was 41 years old, allowing for a 9.5-year purchase based on the statutory formula under s. 28A(2) of the Civil Law Act 1956.

[95] The plaintiffs argued that as a result of the severe injuries sustained, Madam Tan was no longer able to work in her previous occupation, as evidenced by the psychiatric report of Dr Bharathi (PW4), which supported the claim for loss of future earnings. As such, the plaintiffs contended that Madam Tan had lost economically beneficial working years due to the negligence of the first to seventh defendants. Therefore, by applying Madam Tan's net income of RM91,195.52 to the 9.5-year multiplier, the plaintiffs submitted that RM866,357.44 should be awarded under this head of general damages.

[96] The first to seventh defendants submitted that the plaintiffs' claim for Madam Tan's loss of future earnings ought to be dismissed. The said defendants contended that Madam Tan had continued to serve as a salaried director in two companies, namely Hi-Point Impex Sdn Bhd and Kyoshin Heat Treatment Sdn Bhd, where she earned RM3,000 and RM8,000 in directors' fees per month, respectively. As evidence showed her directorship and shareholding remained unchanged after the incident, the said defendants argued that Madam Tan in fact possessed full mental capacity and the ability to undertake occupational responsibilities. Hence, there was no basis for the plaintiffs to assert loss of earnings on her behalf when documents confirmed Madam Tan's ongoing income from her director roles. The said defendants

concluded that the plaintiffs had failed to prove Madam Tan was incapable of gainful employment or that her earning capacity had been diminished to justify any award under this head of claim.

[97] I find merit in the plaintiffs' submission for an award of RM866,357.44, representing Madam Tan's loss of prospective earnings. Incontrovertible evidence proves Madam Tan, aged 41 at the time of the 15 August 2015 accident, earned a net annual income of RM91,195.52 in 2014. As permanent cognitive deficits from her brain injury render Madam Tan unable to undertake her former accounting and bookkeeping duties as credibly assessed by psychiatrist Dr Bharathi (PW4), her future income stream has been severely impacted by the said defendants' negligence.

[98] I apply the legislated calculation under s. 28A(2)(d)(ii) of the Civil Law Act 1956, which prescribes a multiplier of 9.5 years for individuals between ages 31 and 59 who lose future earnings capacity. I have considered but am unpersuaded by the said defendants' contention that Madam Tan retains full mental ability and continues receiving director fees in two companies post-accident. From the candid evidence of PW3 Heng Tong Hau (the second plaintiff and husband of Madam Tan), I find Madam Tan holds nominal directorships with minimal occupational responsibilities. She merely executes documents without comprehension at her spouse's behest to not hinder business operations. I am satisfied that such passive roles generating supplementary income do not defeat her substantive claim for lost prospective earnings from gainful career disruption.

[99] Following prevailing jurisprudence that loss of earnings includes inability to pursue prospective higher incomes, I rely on the Federal Court's ruling in *Ngooi Ku Siong & Anor v. Aidi Abdullah* [1984] 2 CLJ 163; [1984] 1 CLJ (Rep) 294; [1985] 1 MLJ 30, where it was held that when assessing loss of future earnings, the court considers the plaintiff's probable earnings while elements of disadvantage apart from loss of earning power are also compensated under general damages.

[100] Applying this governing principle, Madam Tan in the present case, has not only lost actual income following the accident, but has also been deprived of the capacity to achieve higher incomes through career progression and skill development in future years. But for the injuries inflicted by the negligence of the first to seventh defendants, Madam Tan, given her accounting qualifications, possessed the aptitude and ability to advance professionally and command improved remunerations over time. This prospective benefit has been permanently extinguished by the harm caused by the said defendants. As such, the requested sum of RM866,357.44 covers her stream of lost future earnings and additionally reflects potential income increments thus foreclosed.

Cost Of Future Care

[101] The plaintiffs submitted that RM224,040 should be awarded to Madam Tan as general damages for the cost of future care.

[102] The plaintiffs argued that, based on a life expectancy of 77 years, Madam Tan requires one caregiver providing reasonable care at a cost of RM1,000 per month. Applying the statutory 1/3 deduction for contingencies, this results in a multiplier of 18.67 years. As such, the plaintiffs contended that a sum of RM224,040, calculated on the basis of RM1,000 per month for 18.67 years, should be awarded to provide for Madam Tan's future care necessitated due to the nature of her permanent injuries from the negligence of the first to seventh defendants. Recent case law has affirmed such awards for plaintiffs with brain damage requiring lifelong care and assistance.

[103] The first to seventh defendants submitted that the plaintiffs' claim for RM224,040 towards Madam Tan's cost of future care should be disallowed. The said defendants contended that no caregiver had testified to substantiate the duties performed or the quantum sought. Further, the plaintiffs had failed to adduce medical proof that Madam Tan indispensably requires assistance for daily or complex activities. As updated evidence on her existing condition was lacking, the extent of her residual impairment, if any, was unascertainable. Hence, the said defendants argued that the plaintiffs had not sufficiently demonstrated through cogent evidence that Madam Tan is permanently disabled, necessitating a caregiver, to justify an award under this head. The claim for future care was therefore premised on speculation rather than established facts, warranting dismissal of the same.

[104] I find the plaintiffs have sufficiently proved that Madam Tan requires future care necessitating the some of compensatory sum sought. The evidence of specialist doctors, namely the medical report of Dr Ravi (PW1) dated 18 April 2016 and psychiatric report of Dr Bharathi (PW4) dated 2 March 2017 reliably confirm that Madam Tan suffers lasting cognitive and speech deficits from her traumatic brain injury that compromise her independent functioning. Both experts opine poor prospects of further recovery owing to the duration since the accident.

[105] In assessing quantum, I apply the Court of Appeal's guidance in *Inas Faiqah Mohd Helmi v. Kerajaan Malaysia & Ors* [2015] 3 CLJ 153 approving a deducted multiplier calculated based on average life expectancy. In this instant case, it amounts to 18.67 years, taking into account a life expectancy of 77 years, consistent with the decisions in *Hasniyati Hassan & Anor v. Kerajaan Malaysi*a [2022] 7 CLJ 565; [2022] 10 MLJ 469 and *Noorasmawati Abu Othman v. Kerajaan Malaysia & Ors* [2021] CLJU 2028; [2021] 1 LNS 2028; [2021] MLJU 2439.

[106] Though no caregiver testified, in my judgment, the extensive injuries debilitating Madam Tan's mental faculties and communication reasonably require assistance, as she struggles even with basic tasks. In *Liong Thoo v. Sawiyah Hj Sirat & Ors* [1981] CLJ 126; [1981] CLJ (Rep) 171; [1982] 1 MLJ 286, the monthly cost of care was based on the court's estimate where the court, in 1982, valued the services provided by the mother-in-law at RM200 a month and calculated the cost of care or services based on this estimate. In this case, the court reasoned that compensation can be given in money for services rendered by parents and an estimate must be made of the capital value of such effort and money, past and future, and compensation awarded accordingly.

[107] The monthly costs of care of RM1,000 argued by the plaintiffs is based on the views of the court in *Yusnita Johari*. However, as Madam Tan's injuries are not as severe as in *Yusnita Johari*, I estimate a monthly cost of care of RM500 is a more reasonable figure.

[108] I correspondingly award RM112,020 as reasonable compensation for Madam Tan's pragmatic care needs occasioned by her diminished functionality resulting from the said defendants' negligence.

Special Damages

Costs Of Caretaker

[109] The plaintiffs submitted that special damages should be awarded for the loss of household and domestic services incurred as a result of Madam Tan's injuries.

[110] The plaintiffs argued that since the accident on 15 August 2015, Madam Tan has been unable to manage household and domestic chores independently due to her permanent disabilities. As a result, Madam Tan's mother-in-law has assisted with these services. While these services have been rendered gratuitously, the plaintiffs contended that the law permits recovery of the monetary value for gratuitous services in assessing special damages. Citing *John Andrew Malthouse v. Cyril Steven & Ors* [2014] 8 CLJ 461; [2015] 7 MLJ 548 and *Liong Thoo v. Sawiyah & Ors*, the plaintiffs submitted that RM41,100 should be granted, reflecting the imputed value of replacement domestic services from the date of the accident until the filing of the suit on 18 January 2019. The plaintiffs accordingly pray that this head of special damages be allowed to account for the economic worth of home care services necessitated by the injuries arising from the said defendants' proven negligence.

[111] The first to seventh defendants submitted that the plaintiffs' claim for loss of household and domestic services in the sum of RM41,100 as special damages should be dismissed. The said defendants contended that no evidence had been furnished regarding the actual quantum of services

provided to Madam Tan following the accident, nor had testimony been offered by the alleged caregiver on the nature and extent of the domestic assistance rendered. Hence, the loss claimed remained unsupported conjecture. Further, the said defendants argued that no proof existed that Madam Tan was incapable of independently managing household tasks, with updated medical reports lacking on her existing condition. In the absence of disability substantiated through fresh evidence, the surmise that compensable services were inevitably rendered is legally untenable. The said defendants, therefore, prayed that the unsubstantiated claim for domestic assistance from 2015 to 2019 fails evidentially and should be denied in its entirety, together with similar future claims as unsustainable projections.

[112] I find merit in the plaintiffs' submission that the economic value of domestic care services rendered to Madam Tan following the accident are recoverable as special damages against the said defendants on a joint and several basis. The medical evidence demonstrates that owing to frontal lobe trauma, Madam Tan suffers residual cognitive and neurological sequelae impeding her independence in daily and household activities as assessed by clinicians PW1 and PW4.

[113] Though quantification details have not been furnished firsthand, the affirmation by PW3 that Madam Tan's mother-in-law gratuitously assisted in replacement tasks including cooking, laundry and personal care supports a reasonable inference of ongoing contribution necessitating reimbursement. Following *Liong Thoo v. Sawiyah & Ors*, I allow recovery of imputed value for gratuitous family care arising from a defendant's tort based on a monthly cost of care estimated by the court at RM500 per month based on the same reasoning above for Madam Tan's future costs and care expenses.

[114] I thus award RM20,550 as fair compensation for Madam Tan's mother-in-law's services towards mitigating the burden unconscionably imposed on the plaintiffs through the said defendants' proven negligence.

[115] This award upholds the principle that tort victims are entitled to be restored to their pre-injury position. Where assistance replaced daily functioning disrupted by another's legal wrong, assessing its economic equivalent as special loss promotes restorative justice against responsible parties, regardless of it being gratis by relatives as duty demands.

Medical Costs

[116] The plaintiffs submitted that special damages should be awarded for the out-of-pocket medical expenses amounting to RM218,066.77 incurred at Sunway Medical Centre and RM1,227.60 at Pantai Hospital for Madam Tan's treatment following the accident.

[117] The plaintiffs contended that Madam Tan underwent multiple neurosurgical operations at Sunway Medical Centre, including an emergency decompressive craniectomy, resulting in sizeable medical bills that have been wholly paid for by the plaintiffs. These expenses were supported by documentation, including finalised invoices and official receipts from both healthcare providers, confirming the quantum claimed. As such, the plaintiffs submitted that Madam Tan's medical costs, arising directly due to the injuries from the said defendants' negligence, should be refunded in full as special damages, ordinarily compensable based on proved expenditures.

[118] The first to seventh defendants submitted that the medical costs claimed by the plaintiffs are not recoverable, whether fully or partially, as special damages. The said defendants argued that the expenses incurred at Sunway Medical Centre and Pantai Hospital were already settled through Madam Tan's medical insurance. Citing case law, they contended that compensation should only restore the plaintiffs to their original position; hence, costs defrayed by collateral third-party payments cannot be claimed again from tortfeasors. Further, the said defendants contended that the plaintiffs made a personal choice to transfer Madam Tan from a Government hospital to expensive private healthcare, thereby inflating the bills. They argued that allowing recovery of such optional expenses, unrelated to treatment necessity, would advance the plaintiffs beyond restoration, representing impermissible overcompensation. As the law only mandates reasonable mitigation costs, the extravagant sums claimed, driven by insurance and hospitalisation preferences, remain unrecoverable.

[119] I find the plaintiffs have proved and should recoup the medical expenditures of RM218,066.77 and RM1,227.60 from Sunway Medical Centre and Pantai Hospital, respectively, as special damages for Madam Tan's treatment arising from injuries in the 15 August 2015 collision. The itemised billings, which the said defendants do not dispute as false or inflated, establish necessary neurosurgical operations were performed to save Madam Tan's life post-accident. Her acute condition upon hospitalisation coupled with the catastrophic head trauma rationally compelled urgent specialist intervention.

[120] I am guided by the Federal Court's ruling in *Dr Kok Choong Seng & Anor v. Soo Cheng Lin & Another Appeal* [2017] 10 CLJ 529; [2018] 1 MLJ 685 that compensation for medical costs restores a plaintiff to their original position. Where expenses are covered by insurance, this does not extinguish the plaintiff's right to claim against tortfeasors as the policy represents a contract involving separate premium payments. Following this binding precedent, notwithstanding partial insurance coverage, Madam Tan's full expenditure on requisite treatment reasonably mitigating her severe injuries remains recoverable as loss caused by the first to seventh defendants' proven negligence.

[121] The claimed charges do not seek enrichment but properly indemnify outflows addressing the said defendants' tortious harm. The plaintiffs' choosing healthcare type *per se* absent bad faith does not bar recovery. As Madam Tan would have incurred some medical costs in any event for her grave wounds, I allow both proven sums as recoverable special damages.

Costs Of Traditional Medicine

[122] The plaintiffs submitted that costs incurred for purchasing traditional medicine and healthcare supplements amounting to RM24,065.72 should be awarded under special damages. This expenditure was duly evidenced by purchase invoices, and the second plaintiff also tabulated the breakdown of this amount in his witness statement. The plaintiffs relied on *Nur Syarafina Sa'ari v. Kerajaan Malaysia & Ors* [2019] 9 CLJ 246; [2019] 12 MLJ 741, which states that reasonable expenditure on supplements and special nutritional products necessitated by a plaintiff's injuries to aid recovery are recoverable as special damages. As the out-of-pocket sums claimed were legitimately expended to address Madam Tan's medical issues arising from injuries caused by the said defendants' negligence, the plaintiffs contended that the requested RM24,065.72 should be allowed under this head of claim.

[123] The first to seventh defendants submitted that the plaintiffs' claim of RM24,065.72 towards costs for traditional Chinese medicine and supplements ought to be disallowed. Neurosurgeon Dr Ravi (PW1) clearly testified that he did not advise or endorse the proprietary traditional formulations claimed, and only suggested nutritional brain supplements. However, the second plaintiff's admission under cross-examination revealed that the bulk purchases were made independently without medical opinion, based on his personal selections. Thus, the said defendants contended that Madam Tan's intake of additional unconventional medicine was medically unwarranted and unnecessary. Therefore, allowing unprescribed products would result in overcompensation beyond the plaintiffs' genuine required expenditure, especially when clinician testimony negated the need, establishing that essential mitigating loss referable to injuries caused by the proven negligence had not been demonstrated.

[124] I am persuaded by the first to seventh defendants' submission that the traditional Chinese medicines and healthcare supplements claimed by the plaintiffs represent unnecessary expenditure unrelated to Madam Tan's clinical requirements, warranting dismissal of this head of special damages.

[125] The plaintiffs have not disputed neurosurgeon Dr Ravi's (PW1) expert opinion under testimony that he never prescribed or was even aware of the various proprietary formulations claimed. PW3's own admission that Dr Ravi only suggested nutritional brain supplements, while he independently selected additional products, confirms the larger purchases were electively self-determined.

[126] It is well-established that for pecuniary loss to be compensable, expenditure must have addressed needs arising from the proven wrong. Here, clinician testimony negates that Madam Tan had medical indication for the traditional remedies claimed. That she gratuitously consumed unspecified formulations neither directed nor endorsed by specialists for her traumatic brain injury attracts irrecoverability.

[127] I accept the said defendants' contention that allowing unprescribed supplements personally opted by laypersons risks overcompensation beyond losses legally referable to Madam Tan's diagnosed deficits. Recovery is rightly confined to resources addressing healthcare needs experts confirm tort injuries reasonably necessitated. As expenditure on elective healthcare products without medical basis fall outside this rubric, I disallow the supplementary medicine costs claimed.

Costs For Tuition And/Or Therapy

[128] The plaintiffs submitted that special damages should include the costs incurred for Madam Tan's rehabilitation and therapy sessions following her discharge.

[129] The plaintiffs argued that as a result of the traumatic brain injury, Madam Tan underwent speech, cognitive, and physical rehabilitation to aid her recovery. Supporting documents evidenced that the plaintiffs expended RM7,028 over one year towards therapy fees. While the invoices did not specify session details, the plaintiffs contended that Madam Tan's extensive injuries reasonably required therapeutic intervention. As the invoices were not disputed and the figures aligned with prevailing market rates, the plaintiffs submitted that the full sum should be awarded under special damages, reflecting their actual expenditure on essential rehabilitative services mitigating Madam Tan's impairment attributable to the said defendants' proven negligence.

[130] The first to seventh defendants submitted that the plaintiffs' claim for RM7,028 as rehabilitation and therapy costs should be disallowed in full. The said defendants contended that while invoices were exhibited, they did not disclose session particulars, the identity of trainers who rendered service, or the types of therapy administered. As the documents were vague, bereft of pertinent details, and unvalidated through any testimony, the said defendants argued that these constituted unreliable hearsay that could not sufficiently prove the plaintiffs' alleged expenditure or therapy needs occasioned specifically by the accident injuries as opposed to general wellbeing.

[131] Further, with no updated evidence confirming Madam Tan's present condition necessitating ongoing rehabilitation, the said defendants argue that any award based on remote assessments allowing possibility of recovery

would be speculative. Hence, the said defendants pray the unsubstantiated therapy claim be denied as the plaintiffs have failed to discharge their burden of proving this head of special damages through cogent documentation or testimony.

[132] Having considered parties' submissions, I accept the first to seventh defendants' contention that reimbursement under rehabilitation costs is unsustainable for the non-specific RM7,028 sum sought towards Madam Tan's purported speech and mobility therapies.

[133] As rightly argued by counsel, though invoices are exhibited, these contain no particulars regarding therapies supposedly administered, omitting individual treatment types as well as practitioner identities that appropriately validate the actual expense itemised only by ambiguous general billings.

[134] Beyond unspecified bills solely reflecting gross figures, the plaintiffs proffer no third party validation either through vouchers by providers confirming quoted charges related to detailed rehabilitative services delivered to Madam Tan following her injury. Neither have independent medical specialists endorsed continued therapies as necessary that the invoices only vaguely allude to.

[135] Indeed, only PW3 confirms disbursements, relying on bare receipts, providing no substantive evidence of Madam Tan attending specialised rehabilitation for persisting deficits necessitating such mitigation. No testimony is forthcoming justifying the expenditure as reasonably addressing accident-induced losses, hence, in the absence of disabled proof toward services compensably addressing corollary trauma, permitting the unfounded quantum claimed compounds conjecture as opposed to indemnifying established disabilities.

[136] Accordingly, having weighed appropriate considerations of responsibility for injury against uncertainty regarding alleged therapy the reimbursement sought vaguely addresses, I am compelled to dismiss the indeterminate sum claimed toward indistinct rehabilitation absent tangible particulars of their nature and providers.

Medical And Psychiatric Report

[137] The plaintiffs have claimed the sum of RM2,400 as special damages towards medical report costs, which has been supported by Dr Bharathi's letter dated 30 May 2018, addressed to the plaintiffs' solicitors.

[138] I note that this expense pertains to Dr Bharathi's psychiatric evaluation of Madam Tan and the subsequent preparation of two expert reports dated 2 March 2017 and 25 April 2018, for which charges of RM1,600 and RM800, respectively, were imposed.

[139] The letter itemises these reports referenced in suit as well as the transmission total paid, adequately evidencing the plaintiffs' assertion during trial. As counsel for the first to seventh defendants did not dispute the factual existence of Dr Bharathi's correspondence or contest sums billed, I accept the unchallenged testimony of the second plaintiff affirming its contents and the expenditures outlined therein as rightfully borne for Madam Tan's assessment.

[140] Considering prevailing charges for medical expert opinion, the quantum claimed aligns with reasonable fees expected of specialty documentation crucially evaluating Madam Tan's condition consequent to the collision of the subject matter of these proceedings.

[141] As the outlay addresses legitimate needs occasioned by the said defendants' tort and appropriately restores the pecuniary burden thereby incurred, substantiated through proof they do not refute, fairness warrants granting this head of special damages as compensatory relief justified based on evidence for losses factually sustained. I accordingly award the verified RM2,400 towards said medical reporting costs as reasonable and evidenced mitigation relating to the accident injuries attributable to the first to seventh defendants' negligence.

Conclusion

[142] Premised on the above, the plaintiffs' claim against the first to seventh defendants is allowed, subject to damages awarded by the court as assessed. Liability is found only against the first to seventh defendants as the court finds that on a balance of probabilities the accident was wholly caused by negligence and breach of duty of care by the seventh defendant boat operator for which the first to seventh defendants must shoulder full liability.

[143] There is no finding of liability on the eighth and ninth defendants.

[144] Total damages of RM1,418,222.81 is awarded to the plaintiffs against the first to seventh defendants. This is broken down as follows:

(i) general damages:

(a) pain and suffering and loss of amenities: RM200,000;

(b) loss of future earnings: RM866,357.44;

(c) cost of future care: RM112,020.

(ii) special damages:

(a) cost of care from the date of the incident until the date of filing of this suit (15 August 2015 - 18 January 2019): RM20,550;

(b) medical costs – Sunway Medical Centre: RM218,066.77;

(c) medical costs – Pantai Hospital: RM1,227.60;

(d) costs for traditional medicine: disallowed;

(e) costs for tuition and/or therapy: disallowed;

(f) medical and psychiatrist report: RM2,400.

[145] The court also orders interest on the judgment sum calculated from 18 January 2019, the date of filing of this suit, until its full and final settlement at 5% p.a. together with costs.